Tang Kheng Teong & Anor v Public Prosecutor

HIGH COURT (PENANG) — CRIMINAL APPEAL NOS 41-156-91 AND 41-156(a)-91
VINCENT NG JC
30 MARCH 1992

Personal Property *— Forfeiture — Procedure to be followed in forfeiture proceedings in lower court — Dangerous Drugs (Forfeiture of Property) Act 1988 ss 7, 8, 9, 10, 25 & 35*

The appellants appealed against the decision of the sessions court that the burden to commence proceedings in an application by the public prosecutor under s 32(2) of the Dangerous Drugs (Forfeiture of Property) Act 1988 ('the Act') lay on the appellants. This decision was based on the presumption in s 35 of the Act which states that where any proceedings are brought under the Act, the court shall presume that the property is illegal property unless the person proceeded against proves to the contrary. Section 32 of the Act states that if property is seized and no claim is made within three months of the seizure by any person, the property shall become forfeited. If a person makes a claim, the public prosecutor shall refer it to the sessions court. There is no provision in the Act setting out the procedure for the application by the public prosecutor to a lower court for forfeiture of property whereas there is a provision, s 8, requiring the filing of an affidavit for an application by the public prosecutor to the High Court for forfeiture of property. This would mean that for proceedings under s 32 the public prosecutor would be free from having to comply with the procedure laid out in s 8. In this case, the appellants made claims to the properties which had been seized within the time prescribed and the public prosecutor referred such claims to the sessions court. No affidavit was filed by the public prosecutor. The first appellant applied for a stay of the proceedings in respect of the forfeiture, until the conclusion of the prosecution and appeal (if any) on his drug offence.

Held, allowing the appeal:

(1) The primary purpose of s 32 of the Act is to allow the public prosecutor not only to seize but also to forfeit properties where, inter alia, no claim has been made within the prescribed time. If a claim is made, then in fairness to the claimant and considering the peculiar wording of s 35 of the Act, the phrase in s 32(2) 'refer such claim to a Sessions Court for its decision' presumably requires the public prosecutor to adopt a procedure similar to that laid out in s 8 of the Act. This ought to be so as the claimant should not be deprived of his or her property without having a case to answer.

(2) In view of the lacuna in the Act, the court is of the view that the procedural requirements similar to those in s 8 of the Act must

first be complied with by the public prosecutor in their proceedings for forfeiture in the sessions court.

(3) The public prosecutor ought to adopt the procedure set out in s 8 of the Act in proceedings in the sessions court as well as the High Court as in a case that strikes at the very heart of art 13 of the Federal Constitution, the court should treat with aversion any attempt at forfeiture of properties through summary procedures, without the prior making out of a case by at least affidavit evidence for the claimant to answer.

[Bahasa Malaysia summary

Perayu telah merayu terhadap keputusan mahkamah sesyen bahawa beban memulakan prosiding di dalam suatu permohonan oleh pendakwa raya di bawah s 32(2) Akta Dadah Berbahaya (Perlucuthakan Harta) 1988 ('Akta itu') terletak pada perayu. Keputusan itu berdasarkan anggapan di dalam s 35 Akta itu yang menyatakan bahawa di mana sebarang prosiding dibawa di bawah Akta itu, mahkamah akan membuat anggapan bahawa harta itu adalah harta yang tidak sah melainkan orang itu kemudiannya membuktikan sebaliknya. Seksyen 32 Akta itu menyatakan bahawa jika harta itu dirampas dan tiada tuntutan dibuat dalam tempoh tiga bulan selepas perampasan itu oleh sebarang orang, harta itu akan dilucuthak. Jika seseorang itu membuat tuntutan, pendakwa raya akan merujuknya kepada mahkamah sesyen. Tidak ada peruntukan di dalam Akta itu yang menjelaskan prosedur untuk permohonan oleh pendakwa raya kepada mahkamah rendah untuk perlucuthakan harta itu walhal terdapat satu peruntukan, s 8, yang mengkehendaki pemfailan satu afidavit untuk permohonan oleh pendakwa raya kepada Mahkamah Tinggi untuk perlucuthakan harta itu.

Ini bermakna bahawa untuk prosiding di bawah s 32 pendakwa raya bebas daripada keperluan mematuhi prosedur yang diperuntukkan oleh s 8. Dalam kes ini, perayu telah membuat tuntutan ke atas harta-harta yang telah dirampas dalam tempoh masa yang diperuntukkan dan pendakwa raya telah merujuk tuntutan itu kepada mahkamah sesyen. Tiada afidavit difailkan oleh pendakwa raya. Perayu pertama telah memohon untuk penggantungan prosiding berkenaan perlucuthakan itu, sehingga habisnya pendakwaan dan rayuan (jika ada) berkenaan kesalahan dadahnya.

Diputuskan, membenarkan rayuan itu:

(1) Tujuan asas s 32 Akta itu adalah untuk membenarkan pendakwa raya bukan sahaja merampas tetapi juga melucuthak harta di mana, antara lainnya, tiada tuntutan dibuat dalam tempoh masa yang diperuntukkan. Jika satu tuntutan dibuat, maka demi keadilan kepada penuntut dan memandangkan perkataan-perkataan anih dalam s 35 Akta itu, rangkai kata di dalam s 32(2) 'refer such claim to a Sessions Court for its decision' agaknya memerlukan pendakwa raya menggunakan prosedur yang sama seperti yang

diperuntukkan oleh s 8 Akta itu. Ini sememangnya begitu kerana penuntut tidak patut dilucuthak hartanya tanpa mempunyai satu kes untuk dijawab.

(2) Memandangkan kekosongan di dalam Akta itu, mahkamah berpendapat bahawa kehendak prosedur yang sama seperti yang terdapat di dalam s 8 Akta itu mesti terlebih dahulu dipatuhi oleh pendakwa raya di dalam prosidingnya untuk perlucuthakan di mahkamah sesyen.

(3) Pendakwa raya patut menggunakan prosedur yang diperuntukkan di dalam s 8 Akta itu di dalam prosiding di mahkamah sesyen dan juga di Mahkamah Tinggi kerana, di dalam suatu kes yang mencabar teras perkara 13 Perlembagaan Persekutuan, mahkamah sememangnya patut tidak suka melayan sebarang percubaan untuk melucuthak harta melalui kaedah terus, tanpa pembinaan satu kes terlebih dahulu setidak-tidaknya dengan keterangan afidavit untuk dijawab oleh penuntut.]

Cases referred to

1 *Chu Beow Hin v PP* [1981] 2 MLJ 85 (folld)
2 *Keng Soon Finance Bhd v Pegawai Kanan Kastam, Johore Bahru* [1981] 2 MLJ 249 (folld)
3 *Soong Chee Kong v PP* [1951] MLJ 5 (refd)

Legislation referred to

Customs Act 1967 ss 128(4), 135(2)
Dangerous Drugs (Forfeiture of Property) Act 1988 ss 7, 8, 9, 10, 25, 32, 35
Evidence Act 1950 s 101
Federal Constitution art 13

R Rajasingam (*Ranjit Singh* with him) (*R Rajasingam & Co*) for the first appellant.

Gooi Hock Seng (*Shan & Gooi*) for the second appellant.

Abd Rahim bin Uda (Deputy Public Prosecutor) for the respondent.

Vincent Ng JC: This is an appeal from the decision of the judge of the sessions court who decided that the burden to commence the proceedings in an application by the public prosecutor under s 32(2) of the Dangerous Drugs (Forfeiture of Property) Act 1988 (hereinafter referred to as 'the Act') lay on the appellants.

The decision of the learned judge of the sessions court was based on (a) the presumption in s 35 of the Act which states as follows:

> Where any proceedings under this Act are brought against any person or in respect of any property on the ground that such person is a liable person or that such property is illegal property, the court shall presume that person to be a liable person and that property to be illegal property, unless the person proceeded against proves to the contrary by admissible evidence and where he adduces any such evidence, the Public Prosecutor shall have the right to rebut the same.

(b) s 101(1) of the Evidence Act 1950 which says: A

> Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

and (c) s 101(2) which says: B

> When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

The issue that has to be decided in this appeal is essentially in regard to the procedure that the public prosecutor would have to adopt on matters of forfeiture of properties under the Act. Whereas s 8 of the Act specifically C provides the procedure to be adopted in respect of an application by the public prosecutor to the High Court for forfeiture, there does not seem to be any provision in the Act for a similar application in the lower court, save that s 32(1) of the Act, does provide that:

> Where any property has been seized under this Act ... and — D
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> (a) no prosecution for any offence under any law is instituted with regard to such property;
> (b) no proceedings are commenced by the Public Prosecutor for the forfeiture of such property under Part III; and
> (c) no claim in writing is made by any person that he is lawfully entitled to such property and that it is not liable to forfeiture under this Act or under the E Dangerous Drugs Act 1952,
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> within three months from the date of its seizure, the property shall become forfeited immediately upon the expiration of the said period of three months.

However, a proviso in s 32(2) of the Act states: 'Where within three months from the date of seizure ... a claim in writing is made thereto by any person F the Public Prosecutor shall ... refer such claim to the Sessions Court for its decision.'

Due to lack of specific provisions as to the procedure to be followed in the session court, the public prosecutor has taken the provisions in s 32 as the procedure to be adopted in proceedings for forfeiture in the sessions G court, by virtue of the words 'refer such claims to the Sessions Court for its decision' appearing in s 32(2) as abovequoted. This would mean that in proceedings for forfeiture under this section in the sessions court the public prosecutor would be free from having to comply with the procedure as laid down in s 8 of the Act, which necessitates an application to be made to the High Court supported by an affidavit or affidavits which shall: H

> (a) identify the liable person to be proceeded against, state his address of residence or business, if known, and other relevant particulars, which are known; (b) state the grounds on which he is a liable person; (c) identify the properties to be forfeited, set out their estimated value, and, if known, their location, and (d) state any other matter, circumstance or information which, I in the opinion of the Public Prosecutor, is relevant to the application.

It is important to note that the current sessions court proceedings for forfeiture is wholly based on the seizure of certain properties by the public prosecutor under s 25(2) of the Act from:

(a) the first appellant on 30 June 1990 by a 'Notis mengenai Penyitaan Harta' dated 15 August 1990. He was arrested on 30 June 1990 and charged on 14 July 1990 on a drug offence under s 39B of the Dangerous Drugs Act 1952 in Georgetown Magistrate Court case No 81(91)19 of 1990 — since transferred to the High Court; and

(b) the second appellant on 18 August 1990, 20 August 1990, 30 June 1990, 23 August 1990 and 26 September 1990 by a 'Notis mengenai Penyitaan Harta' dated 21 August 1990 and another similar notice dated 27 September 1990. She was neither arrested nor charged for any offence.

All the above particulars have been confirmed as factual by counsel for both the appellants and by the deputy public prosecutor, Encik Abdul Rahim, during further argument in the appeal.

However, when the appellants lodged their claims to the seized properties the public prosecutor referred such claims to the sessions court vide a letter dated 18 October 1990 which stated, inter alia, 'Pada 30 Jun 1990 penama Tang Kheng Teong telah ditangkap bersama-sama 8.73kg heroin seperti Jelutong Report 3370/90 yang dilampirkan sebagai "Lampiran A".'

Even though claims for the return of the seized properties had been lodged within the time prescribed, no formal application to the sessions court supported by affidavit had been made by the public prosecutor as required in similar proceedings in the High Court under s 8 of the Act.

The rule of construction of penal law is that acts imposing criminal or other penalties should be clear and unambiguous and should be construed narrowly in favour of the person proceeded against. See *Chu Beow Hin v PP.*[1] See also *Maxwell on Interpretation of Statutes* (12th Ed) at p 239.

Guided by the above rule of construction and also bearing in mind art 13(1) of the Federal Constitution as regards a person's right to own and hold property, surely it cannot be said that by s 8 and s 32 of the Act the legislature had intended to discriminate between the respective procedures for forfeiture of properties which are of higher value, in the High Court in contradistinction to properties of lower value, in the sessions court.

As such, upon careful reading of ss 7, 8, 9, 10, 25 and 32 of the Act, I am driven to conclude that the primary purpose of s 32 of the Act is to allow the public prosecutor not only to seize but also to forfeit such properties seized where, inter alia, no person(s) claims such properties within the period of three months — that is, a provision for forfeiture by mere effluxion of time.

However, if such claims are lodged within the said period then, in fairness to the claimants and considering the peculiar wording in s 35 of the Act, the phrase 'refer such claim to a Sessions Court for its decision' in s 32(2) of the Act presumably requires the public prosecutor to adopt a procedure similar to the procedure laid out in s 8(2) of the Act. This ought to be so, as there should at least be some safeguards to ensure that no person should be deprived of the property *claimed by him/her* to be legitimately his/her merely through seizure under s 25 of the Act by the public prosecutor without any proper grounding — for a case to answer — which should comprise the filing of an affidavit (ie evidence on oath) that such claimant is a liable person or that such property is illegal property.

Indeed, the wording of s 35 of the Act — which section appears to be the very linchpin of the public prosecutor's case for supporting the summary manner in which proceedings for forfeiture are to be dealt with by the sessions court — clearly states that the presumption that the claimant is 'a liable person and that the property to be illegal property' arises only where the proceedings under the Act are brought 'on the ground that such person is a liable person or that such property is illegal property'.

As such, in view of the aforesaid lacuna in the Act, this court is of the view that the procedural requirements similar to those set out in s 8 of the Act has first to be complied with by the public prosecutor also in their proceedings for forfeiture in the sessions court. In which event, it does follow that the procedures similar to those set out in ss 9 and 10 of the Act would also be applicable to proceedings in the sessions court. Or otherwise, upon the literal reading of the Act as it stands all proceedings for forfeiture of properties where there are claimants should, in the interest of justice, only be dealt with by the High Court, irrespective of the value of the property involved. However, it is important to note that if the application of the public prosecutor for forfeiture of properties is grounded on a claimant being a 'liable person' as defined in s 7(1)(a)(iii) of the Act, the supporting affidavit filed under s 8 must essentially aver that (and the court should be satisfied that) the person who 'holds, conceals, receives or uses ... any illegal property' *also knows or have reason to believe the same to be illegal property*. As, whereas s 37(d) of the Dangerous Drugs Act 1952 presumes possession and knowledge, s 35 of the Act only states that such person shall be presumed to be a liable person and such property is illegal property, but there is no presumption that such person knows the property to be illegal property.

This court is unable to draw any guidance from similar or parallel provisions in other statutes, in its consideration of the true intention of the legislature in s 32 read in conjunction with s 35 of the Act, save that s 128(4) of the Customs Act 1967 and s 135(2) of the same Act provides something similar (though not quite) concerning the procedure for forfeiture and the issue of presumption respectively.

It must be noted that in proceedings pursuant to s 128(4) of the Customs Act 1967, the function of the President or the magistrate, as the case may be, is to examine the matter pertaining to the claim by the owner of the goods seized. In doing so he has to satisfy himself that firstly, an offence against the Act has been committed and secondly, either (a) the goods were the subject matter of the offence, or (b) where the claim relates to the conveyance, such conveyance was used in the commission of the offence.

In realistic terms, one ought to bear in mind that whereas it may be feasible for the Comptroller of Customs to prove that the customs offence has been committed and either (a) the goods were the subject matter of the offence or (b) such conveyance was used in the commission of the offence, it may be virtually impossible and quite clearly unfeasible for the public prosecutor to prove to the satisfaction of the court that the properties seized were purchased from funds acquired from drug trafficking. Hence, the specific provision of the legislature by way of the presumption in s 35 of the

Act and the further provision in s 10 of the Act which quite clearly requires that the person affected shall first proceed to adduce evidence (for the court's consideration) to answer the allegations in the supporting affidavit filed under s 8 of the Act and also to rebut the presumption in s 35 of the Act against such person. Where the intention of the legislature is manifest the court must give effect to such intention (see *Keng Soon Finance Bhd v Pegawai Kanan Kastam, Johore Bahru*[2] at p 251). Section 10 of the Act is such a manifest provision.

I have earlier said that the public prosecutor ought to adopt the procedures set out in s 8 of the Act in proceedings in the sessions court as well as the High Court for the obvious reason that in a case that strikes at the very heart of art 13 of the Federal Constitution, this court should treat with aversion any attempt at forfeiture of properties through summary procedures, without the prior making out of a case by at least affidavit evidence for the claimant to answer, as provided in s 8 of the Act.

Cases of forfeiture is essentially a civil proceeding but it is conducted by a criminal court for reasons of convenience — as are maintenance proceedings. As such, in an application under s 8 of the Act the person affected may if he/she so wishes, give notice, as in civil proceedings, to the public prosecutor that he/she desires to cross-examine the deponent(s) of the supporting affidavit(s) (mentioned in s 8) and the court should allow him/her so to cross-examine.

In the case of *Soong Chee Kong v PP*[3] which wholly concerns forfeiture of property under s 106 of the Customs Enactment 1937, the learned judge Taylor J had this to say (at p 7, third paragraph):

> Where a claim is made it must first be considered by the Comptroller who may release the goods but cannot forfeit them. This covers cases of seizure on suspicion where circumstances are afterwards explained to the satisfaction of the Comptroller. If he does not release, he must refer the matter to court.
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> The court 'examines' the matter; this is essentially a civil proceeding but it is conducted by a criminal court for reasons of convenience — as are maintenance proceedings. The claimant must allege that he is the owner of the goods and that they are not liable to forfeiture. He must first prove his ownership; I do not think this means absolute ownership, it is enough to shew that he is entitled to the goods in the ordinary course of commerce, for example as consignee. As soon as he has proved this the onus shifts; the Customs Department must then shew that the goods are liable to forfeiture — that is they must justify their seizure. If they fail to justify the seizure the magistrate releases the goods; he must do so or the whole procedure would be abortive.

As confirmed aforesaid by all the parties in this appeal, the first appellant was arrested on 30 June 1990 and on the same day his properties were seized by the public prosecutor, though he was formally charged on a drug offence referred to in the First Schedule of the Act only on 14 July 1990. In view of this, at the hearing of the appeal, the first appellant had also made an oral application to this court under s 7(3) of the Act for an order of stay of all proceedings against the relevant properties until the proceedings in respect of the said prosecution on the drug offence have been finally concluded in the court of original jurisdiction or where there is an appeal in the court of final appellate jurisdiction.

Considering the juxtaposition in time, of the charge and seizure aforesaid, it is obvious that the first appellant falls within the definition of 'liable person' referred to in s 7 of the Act. As such, by virtue of s 7(3) of the Act and the powers conferred to this court under s 35(1) of the Courts of Judicature Act 1964 and s 323 of the Criminal Procedure Code (FMS Cap 6), it is hereby ordered that the current proceedings pending against the first appellant for forfeiture of properties commenced under CMA No 75/90 in the sessions court be stayed until the proceedings in respect of the said prosecution on the drug offence have been finally concluded in the court of original jurisdiction or where there is an appeal in the court of final appellate jurisdiction.

As counsel for the second appellant had expressly requested that no stay of forfeiture proceedings against her be ordered by this court, the public prosecutor may, in her case, proceed with their forfeiture proceedings provided that they (the public prosecutor) adopt procedures as laid down in s 8 of the Act, in any event in respect of the second appellant.

As it is envisaged that, due to the growing drug menace facing our society, the number of such proceedings by the public prosecutor for seizure and forfeiture of property acquired from illgotten gains of drug traffickers would substantially increase in the course of time, perhaps it may be prudent for the legislature to consider a careful re-study of this Act with the view to making the appropriate amendments, while of course bearing in mind the expressed words and spirit enshrined in art 13 of the Federal Constitution which enjoins the state from depriving a person of his property save in accordance with the law. The Act as it now stands has engendered agonizing debate on the issues discussed above and unless amended, the same issues may cause further controversy in the courts in future proceedings such as the current case.

Due to the keen public interest that this case has generated and considering that this appeal turns wholly on the question of law and the interpretation of the Act, where an appropriate application is made by any party herein, this court would consider favourably any request for leave to the Supreme Court.

Order accordingly.

Reported by P Arul Selvamalar